IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1479

DONALD R. PLUNKETT,

Petitioner,

vs.

CITY OF LAKEWOOD,

Respondent.

Petition for Writ of Certiorari to the California Court of Appeal, Second Appellate District.

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I.
Introduction.

Petitioner, Donald R. Plunkett, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal in the consolidated cases of Donald R. Plunkett, Plaintiff, Cross-Defendant and Appellant, v. City of Lakewood, Defendant, Cross-Complainant, and Respondent and Donald R. Plunkett, Plaintiff, Appellant, v. City of Lakewood, Defendant, Respondent, Case No. 49610. The Supreme Court of the State of California denied a Petition for Hearing in the case by an Order dated January 19, 1978.

II.
Opinions Below.

A. The Opinion of the California Court of Appeal dated November 15, 1977, is attached hereto as *Appendix "A"*. A Petition for Rehearing was timely filed and denied by the California Court of Appeal on December 9, 1977.

B. A petition for hearing was timely filed with the Supreme Court of the State of California which petition was denied by the Supreme Court pursuant to an order dated January 19, 1978. A copy of that Order is attached hereto as *Appendix "B"*.

III.
Grounds on Which Jurisdiction Is Invoked.

A. The date of the decision of the California Court of Appeal is November 15, 1977. A Petition for Rehearing was timely filed with the California Court of Appeal, which petition was denied on December 9, 1977. A Petition for Hearing to the Supreme Court of the State of California was denied by that Court on January 19, 1978.

B. The statutory provision concerning jurisdiction of this court to review the decision of the state court by writ of certiorari is Title 28, U.S. Code, Section 1257.

C. A judgment of an inferior state court may be reviewed where a writ of error to the highest court of the state has been denied. *Bacon v. Texas,* 163 U.S. 207, 41 L.Ed. 132 (1896).

IV.
Questions Presented for Review.

1. This Petition for Certiorari raises several questions under the Fourth Amendment, made applicable to the States by the Fourteenth Amendment, *Mapp v. Ohio,* 367 U.S. 643.

A. Whether evidence obtained consisting of photographs taken and inspections made by City officials from a utility right-of-way abutting Petitioner's property which was licensed to and fenced by Petitioner, without either a warrant or emergency or the consent of anyone from Petitioner constituted an unreasonable search within the meaning of the Fourth Amendment to the United States Constitution under the decisions in *Camara v. Municipal Court* (1967) 387 U.S. 523 and *See v. City of Seattle* (1967) 387 U.S. 541.

B. Whether evidence obtained consisting of photographs taken and observations made by City officials through the use of low flying helicoper overflights of the Petitioner's property, without warrant, emergency or the consent of anyone from Petitioner constituted an unreasonable search within the meaning of the Fourth Amendment.

C. Whether inspections made by City officials on property owned by Petitioner but occupied by tenants without either a warrant or the consent of anyone residing in said premises constituted an unreasonable search within the meaning of the Fourth Amendment.

This Petition for Certiorari raises additional questions:

D. Whether the trial court improperly excluded evidence relevant to the assertion that the totality of the City official's actions against the Petitioner was a discriminatory enforcement of the laws of the City and State, thereby denying Petitioner due process of law under the Fourteenth Amendment of the United States Constitution which prohibits any state action which denies citizens of states equal protection of the laws.

E. Whether California Evidence Code 352 which allows the court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury was improperly applied in a non-jury trial by excluding evidence relevant to the assertion by the Petitioner that he had been subject to discriminatory enforcement of zoning regulations by the City of Lakewood officials thereby denying Petitioner due process of law under the Fourteenth Amendment of the United States Constitution which prohibits any state action which denies citizens of states equal protection of the law.

V.

Constitutional and Statutory Provisions Involved.

A. Article IV of the Amendments to the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated;

> and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

B. Article XIV, Section One, of the Amendments to the Constitution of the United States provides in part:

> "(N)or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

C. Section 352 of the Evidence Code of the State of California which was in effect at the time of this case provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

D. Section 1822.50 of the Code of Civil Procedure of California which was in effect at the time of this case provides:

> "An inspection warrant is an order, in writing, in the name of the people, signed by a judge of a court of record, directed to a state or local official, commanding him to conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, or zoning."

Section 1822.57 of the Code of Civil Procedure of California which was in effect at the time of this case provides:

"Any person who willfully refuses to permit an inspection lawfully authorized by warrant issued pursuant to this title is guilty of a misdemeanor."

Section 1822.55 of the Code of Civil Procedure of California which was in effect at the time of this case provides:

"An inspection warrant shall be effective for the time specified therein, but not for a period of more than 14 days, unless extended or renewed by the judge who signed and issued the original warrant, upon satisfying himself that such extension or renewal is in the public interest. Such inspection warrant must be executed and returned to the judge by whom it was issued within the time specified in the warrant or within the extended or renewed time. After the expiration of such time, the warrant, unless executed, is void."

VI.
Statement of the Case.

Petitioner was the owner of property consisting of Lots 1 through 7, generally described as 6101, 6107, 6113, 6117, 6123, 6129 and 6133 North Ibbetson in the City of Lakewood, California. These properties were constructed as single family dwelling houses and garages and were in the unincorporated territory of the County of Los Angeles. On September 25, 1962 the aforementioned property of the Petitioner was annexed to the City of Lakewood by Ordinance. Subsequent to the 1962 annexation Petitioner's structures remained more or less out of official scrutiny, inspection or investigation until on or about November 1969 when inspectors of the City of Lakewood sought permis-

sion to enter the premises which was denied by Petitioner. They again tried to enter the premises on November 21, 1969 and were again denied permission and thereafter requested an inspection warrant which was issued by a Judge of the Los Cerritos Municipal Court pursuant to the provisions of Sections 1822.50 *et seq.* of the Code of Civil Procedure of the State of California on November 28, 1969 which permitted the inspectors to make inspection of the premises, lots, buildings and structures, including the rear yards thereof, and all areas enclosed by fences, as well as the interiors of any of the buildings or dwellings located at 6107, 6113, 6117, 6123, 6129 and 6133 North Ibbetson in the City of Lakewood, California. At the appointed time and place the inspectors came on the property and began their inspection but were discovered by the Petitioner who denied them further access to the premises. The City of Lakewood requested that the County Sheriff cite the Petitioner for refusal to allow the City to inspect the property under the inspection warrant pursuant to Section 1822.57 of the Code of Civil Procedure of California, a misdemeanor. Petitioner was found guilty on the charge and sentenced to ten days in the County Jail, sentence suspended and placed on summary probation on condition that he provide entrance to the property named in the warrant in Case No. M37030.

Petitioner sought and obtained an alternative writ of prohibition from the Superior Court, Los Angeles County, California. The City of Lakewood. Respondent herein, was named as the Real Party in Interest. The case was never heard and finally went off calendar when Petitioner's conviction in M37030 was *reversed,* by a decision of the Appellate Department of the

Superior Court of Los Angeles on the basis that the warrant was too broad and that there was no limitation to the inspection called for and for failure to give adequate prior notice required under the California Statute.

On August 18, 1970 inspectors of the City of Lakewood filed a complaint in the Los Cerritos Municipal Court alleging that Petitioner was guilty of four counts of unlawfully operating rental units under applicable sections of the Lakewood Municipal Code and of unlawfully maintaining an interior lot without providing required side yard, in the case of *People v. Plunkett*, No. M39760.

Pursuant to a stipulation it was established that City officials observed the aforementioned properties both from the ground and two helicopter overflights during the summer of 1970. The observations on the ground were made from the Southern California Edison Company right-of-way by obtaining "permission" from the Edison Company representative who accompanied the inspectors through a locked gate and wall surrounding the property which had been for years licensed to the Petitioner by Edison Company thus enabling the inspectors to inspect and photograph the Petitioner's property abutting from the licensed Edison right-of-way.

Petitioner was found guilty after jury trial on February 16, 1971 of ten counts of misdemeanors, involving operating rental units in violation of the Lakewood Municipal Code and maintaining interior lots without providing the side yards required by the Municipal Code and was directed to pay a fine in the aggregate of $2,000 or to serve 364 days in the County Jail. An appeal was taken from the judgment of conviction to the Appellate Department of the Superior Court

of Los Angeles County and on May 11, 1972 the Appellate Department affirmed the judgment without written opinion. After the Appellate Department refused Plaintiff's petition for rehearing or certification to the Court of Appeal of the State of California, Petitioner sought a Writ of Habeas Corpus in the United States District Court, Central District of California, in the case *Plunkett v. Municipal Court of the Los Cerritos Judicial District, County of Los Angeles, State of California,* Case No. 72-1933 RJK to discharge Petitioner sought a Writ of Habeas Corpus to discharge him from the judgment on the basis that the Municipal Court misdemeanor conviction was procured in violation of Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution by reason of evidence procured and used in the Municipal Court case consisting of photographs of Petitioner's property from a police helicopter and under California Code of Civil Procedure, Sections 1822.50 *et seq.* (enacted in 1968 to meet the new constitutional directives made necessary by the companion cases of *Camara v. Municipal Court,* 387 U.S. 523 (1967) and *See v. City of Seattle,* 387 U.S. 541 (1967) holding that a search warrant is required for regulatory searches wherein entry is refused by the occupant). After the first inspection warrant was partially executed then ruled invalid no further inspection warrant was sought or obtained by the City of Lakewood officials.

Petitioner, Donald R. Plunkett, then filed a civil complaint in the Superior Court on February 4, 1971 and requested a hearing on an application for a temporary restraining order. The action was to enjoin the City of Lakewood from prosecuting the Plaintiff for alleged violations of the City of Lakewood's zoning

ordinance in respect to the maintenance of improved real property owned by the Petitioner, consisting of seven lots and structures thereon in the City of Lakewood, California.

Petitioner filed an additional action in the same court on August 25, 1972. In this second action Petitioner sought declaratory relief to determine the validity and construction of the ordinances of the City of Lakewood, and a permanent injunction to restrain the City of Lakewood from enforcing its zoning ordinance in respect to the property owned by the Petitioner. Petitioner alleged that he was the sole proprietor and owner of a license from the Southern California Edison Company, and that a controversy existed between Petitioner and the City as to the number of horses that Petitioner could maintain on said property and that the City was threatening to prosecute Petitioner from maintaining said horses and an injunction was sought.

The Defendant City in its answer to the complaint admitted that Plaintiff's land and the land subject to the Southern California Edison Company license were annexed by the City of Lakewood in 1962, and that there was a controversy between Petitioner and Defendant over the grazing of horses on said land; and that it had authorized criminal prosecution against the Petitioner for violation of its ordinance, and otherwise denied the material allegations of the complaint. A preliminary injunction enjoining the Defendant City from criminally prosecuting Petitioner for alleged violations of the Lakewood Municipal Code was granted.

Defendant City was then permitted to file a cross-complaint seeking an injunction against a catalogue of alleged illegal uses by Petitioner, chiefly, using a

single family residential property for multiple family uses—in addition to the matter of Petitioner's horse grazing.

The dispute was presented at a trial which started in January 1975, and in July 1976 the trial court utilizing the evidence obtained without a warrant over the objections of Petitioner then filed its findings of fact and conclusions of law resulting in a judgment in favor of the City on the two cases which had been consolidated for trial.

The judgment provides, in summary, that Petitioner is enjoined from constructing, using, occupying or maintaining more than one single family residence on any of the seven lots; must provide for each lot a garage or carport with at least two storage spaces; must provide in connection with construction of any new building or alteration of an old building a side yard and a rear yard in accordance with the City's Code; must, after the present license to use the Southern California Edison Company right-of-way expires, maintain animals on such property only in accordance with the City's Code; may not occupy any building or structure unless and until a certificate of occupancy is obtained; may not use the properties for other than a single family residence with specified limitations on roomers or boarders; must reconvert several former garages to garages; must remove a carport installed so that a use of a garage is not blocked; must remove a solid wall and must obtain a permit for a swimming pool on the premises. The Court of Appeal of the State of California affirmed the decision of the trial court.

On January 14, 1977, the United States District Court dismissed the petition for habeas corpus without

considering the Fourth Amendment claim. On January 19, 1977 Petitioner filed a notice of Appeal to the Ninth Circuit, United States Court of Appeals from the District Court's order entered January 14, 1977 dismissing the habeas corpus petition. The United States Court of Appeals for the Ninth Circuit made its order filed November 16, 1977 granting Petitioner's application for a certificate of probable cause to appeal the denial of this habeas corpus petition. The matter is still pending in the United States Court of Appeals for the Ninth Circuit No. 77-8074 entitled Donald R. Plunkett, Petitioner, v. The Municipal Court of the Los Cerritos Judicial District, County of Los Angeles, State of California.

VII.

Grounds and Reasons for Granting Writ of Certiorari.

A. Evidence obtained consisting of photographs taken and inspections made by City officials from a utility right-of-way abutting Petitioner's property which was licensed to and fenced by Petitioner, without either a warrant or emergency or the consent of anyone from Petitioner constituted an unreasonable search within the meaning of the Fourth Amendment to the United States Constitution under the decisions in *Camara v. Municipal Court* (1967) 387 U.S. 523 and *See v. City of Seattle* (1967) 387 U.S. 541.

B. Evidence obtained consisting of photographs taken and observations made by City officials through the use of low flying helicopter overflights of the Petitioner's property, without warrant, emergency or the consent of anyone from Petitioner constituted an unreasonable search within the meaning of the Fourth Amendment.

C. Inspections made by City officials on property owned by Petitioner but occupied by tenants without either a warrant or the consent of anyone residing in said premises constituted an unreasonable search within the meaning of the Fourth Amendment.

By the companion cases of *Camara v. Municipal* Court, 387 U.S. 523 (1967), and *See v. City of Seattle,* 387 U.S. 541 (1967), a search warrant is required for regulatory searches where entry is refused by the occupant. In *Camara,* the United States Supreme Court applied the requirement of a regulatory search to the search of residential areas. The *See* case, *supra,* required the issuance of a search warrant for the regulatory inspection of commercial areas. It was further made clear that the rule was not confined to criminal prosecutions. The court held that the businessman, like the occupant of a residence, has a right to be free from unreasonable official entries.

To meet the new constitutional directives, a new form of search warrant was devised, and a procedure for its use was specified, by the 1968 California Legislature (CCP §§1822.50 *et. seq.*).

A warrant was obtained by the City under these sections but was later quashed and the inspections complained of herein then took place without a new warrant being sought.

We have before this Court a warrantless inspection of housing and business premises in a nonemergency situation and without consent.

The California Court of Appeal stated in its decision that:

> "The bulk of Plaintiff's brief on appeal is devoted to challenging evidence allegedly obtained

in violation of his constitutional right. None of his contentions has merit." (Appendix A, Page 6).

"There is no merit to Plaintiff's contention that the overflights constituted an invastion (*sic*) of his privacy. First, the initial patrol overflight was not a search." (Appendix A, Page 7).

"Moreover, Plaintiff cannot have a reasonable expectation of privacy with respect to objects as conspicuous as garages and residences." (Appendix A, Page 8).

With respect to observations from the Edison property the Court of Appeal stated:

"Charles Chivetta photographed the rear of Plaintiff's property from the Edison right-of-way. Plaintiff contends that the evidence based on Chivetta's observations and photographs from the Edison right-of-way should have been suppressed because the City obtained the Edison Company's consent by coercion. There is no merit to that contention. Charles Chivetta wrote to John Overmeyer, a representative of the Edison Company and informed the Edison Company, in substance, that Plaintiff was unlawfully keeping horses on property controlled by Edison and if the City were to file a complaint, Edison would be named as a party. Rather than coercion, the Edison Company's willingness to permit Defendant's representatives on its property reflects only a desire to obey the law or a desire to cooperate with the City because the Company knew it was not disobeying the law." (Appendix, Page 8).

By stipulation between the parties in the case *sub judice* the helicopter overflights were made without a warrant:

"By police aircraft for the *specific purpose* of viewing Mr. Plunkett's properties and that because of zoning violations (the inspector) had observed, (the inspector) subsequently ordered with the concurrence of the City administration another overflight with the specific intent to photograph those violations. These overflights were not of an ordinary occurrence, only two having been made in the last year, and *both of them were to view Mr. Plunkett's property;* that (the inspector) was not allowed by Mr. Plunkett to inspect the property and that at the date he testified in the case . . . M 39767, (the inspector) was on the rear portion of the property for the very first time with the jury in that case.

That what was apparent from the outside was enough for him to request a police helicopter and along with himself overfly Mr. Plunkett's property and make observations therefrom *for the specific purpose of locating violations of the zoning code.*

That when he saw the extent of the apparent violations he determined he would have to prosecute.

That he sent a photographer out in another Sheriff's helicopter to overfly Mr. Plunkett's property and take pictures; that this was the only way and the best way to show what actually existed on Mr. Plunkett's property in that he, the witness, had been denied access to it by Mr. Plunkett."

The California Court of Appeal decision states:

> "Apparently, it was not until Michael White's helicopter flight in 1969 that the violations become apparent. *This was at least in part because Plaintiff had built a high fence to prevent anyone from seeing what he was doing with his property.*" (Emphasis added.)

The Court of Appeal concluded that the Petitioner (and tenants of the other houses) did not have a reasonable expectation of privacy.

The decision of the Court of Appeal with reference to the observations and photographs from the Edison right-of-way does not deal with or discuss the error (mentioned in Appellant's Opening Brief in the Court of Appeal) that the photographs taken in and observations made from the Edison right-of-way abutting the Plaintiff's property and over which the Plaintiff had an exclusive license or lease, and around which as the Opinion states "Plaintiff had built a high fence to prevent anyone from seeing what he was doing with his property", constituted an illegal inspection under *Camara* and *See*. In *Chapman v. United States*, 365 U.S. 610 (1961), similar to *Stoner v. California*, 376 U.S. 483 (1964), it was made clear that a landlord may not, absent "exigent circumstances" (to render aid, *e.g.*) consent to a search of the premises of his tenant, even to view waste or abating nuisance on the premises. Whether the Edison Company acceded (voluntarily or not) to the inspector's request to come on the land, cannot serve to validate the City of Lakewood's conduct. It is not the right of privacy of Edison Company, but of the Petitioner that is at issue, and thus it would be untenable to conclude

that the Edison Company, a neutral entity with no significant interest in the matter, may validly consent to an invasion of its lessee's rights.

The Edison Company representative unlocked the eight foot fence, and admitted the City of Lakewood Inspectors. The inspector stated that the purpose of the entry was to see if violations of zoning laws had been corrected and to take pictures of the abutting property. That the right-of-way was the only place where he could obtain the view to take the picture and in point of time, the entry was made without an inspection warrant, the original inspection warrant having been previously ruled invalid.

The area was invaded, although the Petitioner had taken all necessary steps to insure privacy by erecting an 8 foot wall with a locked gate. Secondly, it appears that the "consent" if it be such, obtained from the Edison Company to enter upon the right-of-way in order to view Petitioner's property was the result, as a matter of law, of coercion. In *Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788 (1968) this court concerned itself with submission to a claim of lawful authority. The court determined that a response which is generated by a claim of lawful authority which does not exist is, as a matter of law, involuntary and therefore such consent is invalid. The courts of California follow the same principle. See *People v. Shelton*, 60 Cal.2d 74 (1964).

There is *no* evidence of consent of any of the occupying parties. A thorough discussion of the necessity for consent from the occupying parties occurs in *Stoner v. California*, 376 U.S. 483, 84 S.Ct. 889 (1964). In that case, the United States Supreme Court de-

termined that a hotel clerk could not consent to the search of the room of an absent guest. In *Chapman v. United States,* 365 U.S. 610, 81 S.Ct. 776 (1961) the Court similarly determined that a landlord did not have the ability to consent to the search of the tenant's property. These propositions have been forcefully followed by the California courts. See for example, *People v. Verbiesen,* 6 Cal. App. 3d 38 (1970); and *People v. Frank,* 225 Cal. App. 2d 339 (1964).

In the absence of such consent from those occupying the lots, the "inspection" must be regarded as an illegal search and the fruits of that search, of course, cannot be utilized. This principle must further be extended to the examinations of some of the structures on those lots. Thus, although the inspector testified he believed that some of the structures were occupied, he made no attempt to obtain consent from the occupants to examine the structures. Consequently, the entire inspection was pursued in violation of the Fourth Amendment rights of these individuals and should not have been used before the Superior Court.

D. The trial court improperly excluded evidence relevant to the assertion that the totality of the City official's actions against the Petitioner was a discriminatory enforcement of the laws of the City and State, thereby denying Petitioner due process of law under the Fourteenth Amendment of the United States Constitution which prohibits any State action which denies citizens of States equal protection of the laws.

E. California Evidence Code Section 352 which allows the court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate

undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or misleading the jury was improperly applied in a non-jury trial by the court excluding evidence relevant to the assertion by the Petitioner that he had been subject to discriminatory enforcement of zoning violations by the City of Lakewood officials thereby denying Petitioner due process of law under the Fourteenth Amendment of the United States Constitution which prohibits any state action which denies citizens of states equal protection of the law.

In *Yick Wo v. Hopkins* (1886) 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, this court considered a claim of discriminatory enforcement brought by a laundry owner operating in a wood constructed building. The individual, Yick Wo, proved that 280 persons had applied for permits from the City of San Francisco but the permits had been granted to only 80 non-Chinese applicants and had been denied to the 200 Chinese applicants. The United States Supreme Court found discrimination in the application of the ordinance, even though it found the ordinance valid on its face.

In *United States v. Crowthers,* 456 F.2d 1074 (4th Cir. 1972) the Court of Appeals for the Fourth Circuit reversed a conviction for disorderly conduct because the defendants, who were protesting the war in Vietnam, were less noisy than other groups (military bands) who were not prosecuted. The court suggested that whether the defendants raise an inference of discrimination, the burden of proof should switch to the government to justify the selective enforcement. *Id.*

> "It is neither novel nor unfair to require the party in possession of the facts to disclose them.

> We think that defendants make a sufficient *prima facie* showing that application of the noise and obstruction regulation to them was pretensive and that the government being in possession of the facts as to noise and obstruction of approved activity, should have come forward with evidence, if it could, to rebut the entrance of a double standard." *Id.* at 1078.

In *United States v. Falk,* 479 F.2d 616 (7th Cir. 1973) the Court of Appeals for the Seventh Circuit adopted the approach suggested in *Crowthers.* Upon a showing of reasonable doubt, the court shifted the burden to the prosecution to provide compelling evidence that the decision to prosecute was arrived at in good faith. *Id.* at 623-624.

The court disapproved of the frequent practice of simply

> "Dismissing all allegations of illegal discrimination in the enforcement of criminal laws with a reference to . . . (the statement) that the conscious exercise of some selectivity in the enforcement of laws does not violate the Constitution." *Id.* at 624.

The Defendant in *Falk* was convicted of failure to possess a selective service card. The evidence showed that 25,000 men who turned in their draft cards were not prosecuted. *Id.* at 621. In addition, the Selective Service had a policy of not prosecuting violators of the card possession regulation. 479 F.2d at 623. Additional evidence showed that the government was opposed to the Defendant's draft counseling service. *Id.* at 621. The Court in *Falk* found this evidence established a *prima facie* case of improper discrimination, and the court shifted the burden to the prosecution to show that its motives were proper. *Id.* at 624.

Evidence of discriminatory enforcement usually lies buried in the consciences and files of law enforcement agencies and must be ferreted out by the defendant.

The first obstacle is showing intentional or deliberate discrimination. The United States Supreme Court emphasized this element in *Snowden v. Hughes,* 321 U.S. 1 (1944) (alternate holding) which stated that

> "[t]he unlawful administration by state officers of a state statute . . . resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination." *Id.* at 8.

The court here improperly excluded evidence relevant to the assertion of the claim that the totality of the City of Lakewood's action against the Petitioner was the result of discriminatory enforcement of the laws of the City of Lakewood, thereby depriving Petitioner of due process of law pursuant to the Fourteenth Amendment to the United States Constitution.

The City official testified in this case that in 1974 the City of Lakewood performed approximately 28,000 inspections of property such as Petitioner's which resulted in not one single criminal prosecution for alleged zoning violations, even though zoning violations did indeed exist.

The Court of Appeal of California in its Opinion (Appendix A, Page 9) states "Plaintiff's theory throughout was that he had been the subject of discriminatory enforcement of zoning violations."

The record reflects that the Petitioner was prosecuted in the Municipal Court for alleged zoning violations at the request of the City. During the course of the trial at bench, Petitioner's counsel attempted to inquire of the city inspector concerning a procedure involving a notification form being sent to a property owner if a permit existed for a particular structure, but no final permit had been obtained. Petitioner's counsel inquired whether the City had brought any civil actions to force persons to get final permits when those persons had been notified by mail under the notification system. The City objected and the court sustained the City's objection on the basis of "relevancy." By way of offer of proof Petitioner's counsel asserted that the evidence was relevant to a claim of unequal protection and discriminatory enforcement in view of the fact that:

> ". . . for the last two years they have been notifying people that they are supposed to get a final on certain property and, furthermore, that apparently Plunkett is the only one who has ever been sued over the matter and I would offer to prove that that is true in this case.
>
> ". . . we did want to note that the offer of proof would be through this witness and others that Mr. Plunkett has been having a running battle with the City of Lakewood since 1960, that he has been running for City Council, that he is presently running again for City Council, that the prosecution in this case of Mr. Plunkett is discriminatory.
>
> ". . . and that Mr. Plunkett has been a thorn in the side of the power structure in Lakewood and they brought this action primarily for that purpose and that it denies him equal protection of the laws and it is discriminatory prosecution which we have already shown with respect to the innumerable criminal prosecutions, and further, this is the only case the City of Lakewood has ever had going against anyone for an alleged violation—civil case in Superior Court of setback requirements or failure to have final inspections on any properties."

The record shows that Petitioner was prosecuted by the City of Lakewood and was

> "twice found guilty in the Municipal Court of violating Defendant's code, . . ." Appendix A, Page 5).

Petitioner was prosecuted in the Superior Court action for constructing a four foot chain link fence in violation of a 42″ height limitation of the City and for his construction of a six foot fence in violation of applicable laws

> "with the purpose and intent of maintaining therein his own domain, immune from City regulation, inspection or City laws." (Appendix A, Page 5).

The Opinion of the Court of Appeal of the State of California then states,

> "There was no evidence that the City was harassing the Plaintiff." (Appendix A, Page 5).

No further evidence was introduced by virtue of the Court's ruling that such evidence was not "relevant" and thereby inadmissible.

Petitioner contends that having made a *prima facie* showing by way of offer of proof and foundation that the City of Lakewood in 1974 performed 28,000 inspections which resulted in not one single criminal

prosecution nor civil prosecution, that the Petitioner was deprived of due process of law by the refusal of the trial court to allow Petitioner to establish or at least to attempt to establish beyond that which was already shown a deliberate invidious discrimination against him by prosecutorial authorities of the City of Lakewood. This discriminatory enforcement defense did not rest simply upon allegations of laxity of enforcement, instead, Petitioner clearly alleged that the City of Lakewood law enforcement authorities undertook a practice of "intentional, purposeful and unequal enforcement of penal and civil statutes against him."

VIII.
Conclusion.

> "Expectations of privacy are not earthbound. The Fourth Amendment guards the privacy of human activity from aerial no less than terrestrial invasion . . . Judicial implementations of the Fourth Amendment may need constant accommodations to the ever intensifying technology of surveillance . . . Reasonable expectations of privacy may ascend into the airspace and claim Fourth Amendment protection." (*Dean v. Superior Court* (1973) 35 Cal. App. 3d 116.

This issue should be resolved by the United States Supreme Court. It affects programs which are aimed at securing city wide compliance with minimum physical standards and as the dissenting opinion (three Justices) stated in the *See v. Seattle* case, *supra,* the warrant procedure strikes down hundreds of city ordinances, jeopardizes the health, welfare and safety of millions of people and "sets up in the health and safety codes

area inspection of a new-fangled 'warrant' system that is entirely foreign to Fourth Amendment standards."

Balanced against the need for prosecutorial discretion, is society's interest in seeing that laws are uniformly enforced and that the integrity of the judiciary branch is thereby maintained.

Justice Brandeis once wrote that

> "(Our Government) teaches the whole people by its example . . . if the Government becomes a law breaker, it breeds contempt for laws; it invites every man to become a law unto himself; it invites anarchy (*Olmstead v. United States,* 277 U.S. 438, 485 (1927) Brandeis, J. dissenting)."

It must be presumed that the legislatures intend that the laws they pass be impartially applied. The availability of discriminatory enforcement as a defense thus serves a good purpose; it acts as a constant reminder to the executive that the will of the people, expressed through the legislative branch, should be obeyed. These are the same purposes which have been articulated by the United States Supreme Court to justify the exclusionary rule on search and seizure cases.

For the foregoing reasons the petition for writ of certiorari should be granted and the decision of the California Court of Appeal should be reversed.

Respectfully submitted,

MAURICE HARWICK,
Attorney for Petitioner.

APPENDIX A.

Opinion of the District Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

Donald R. Plunkett, Plaintiff, Cross-Defendant, and Appellant, v. City of Lakewood, Defendant, Cross-Complainant, and Respondent.

Donald R. Plunkett, Plaintiff, Appellant, v. City of Lakewood, Defendant, Respondent. 2 Civ. 49610 (Super.Ct. SEC 8296).

Filed November 15, 1977.

For many years, plaintiff and cross-defendant Donald R. Plunkett has been at odds with defendant and cross-complainant, City of Lakewood, over the uses to which he could put his property. This litigation started in 1972. Several years later, in July 1975, the trial court filed 200 pages of findings of fact and conclusions of law resulting in a 17 page judgment in favor of the city. In short, plaintiff was enjoined from his numerous illegal uses of his property and denied any relief whatsoever on his own complaints. This appeal involves two cases consolidated for trial which, to simplify matters, we treat as one action.

In August 1972, plaintiff filed a complaint seeking declaratory and injunctive relief with respect to his use of his property to graze horses in excess of that number permitted under defendant's Municipal Code. A preliminary injunction was granted in September 1972. Defendants were then permitted to file a cross-complaint seeking an injunction against a catalog of illegal uses by plaintiff—chiefly, using a single-family residential property for multiple family uses—all this in addition to the matter of plaintiff's horse grazing.

In February 1971, plaintiff had filed another action to enjoin defendant from criminally prosecuting him for various violations of defendant's Municipal Code. This complaint was amended to seek declaratory relief concerning plaintiff's use of his property. Plaintiff also sought a declaration of rights concerning his claimed exclusive right to serve water through the "Plunkett Water Company." Eventually these two cases —SEC 8296 and SOC 24763—were consolidated and transferred to the South District.

The dispute, as finally presented at a trial which started in January 1975, involved plaintiff's horse grazing activities, his water company, the use of his property for illegal multiple residential uses and the maintenance on his property of structures which did not conform to defendant's code. On appeal, plaintiff pays no attention whatsoever to the 200 pages of findings of fact and conclusions of law. We accept those findings as the basis for our own statement of facts.

FACTS[1]

Since 1945 plaintiff has owned several parcels of land known as 6101 through 6133 Ibbetson Avenue in Lakewood. These parcels were part of unincorporated

[1]Any straightforward presentation of the facts legal issues involved in this case masks the unique character of these proceedings. We quote from the trial court's announcement of intended decision: "The trial of this matter has been rendered novel, if not bizarre, by the unique and almost experimental approach taken to each issue in the entire case by counsel for the plaintiff. Like a football team that disdains any and all offensive plays, but relies entirely on the prospect of intercepting its opponents' forward passes and running them for touchdowns, the plaintiff here refused to put on any evidence, indicating that he wished to reserve the right to put on rebuttal evidence if he later chose to do so. This, of course, was inconsistent with the provisions of Code of Civil Procedure Sections 631.7 and 607, . . .

territory of Los Angeles County until September 1962, when the parcels were annexed by defendant City. Until 1962, the parcels of land were subject to county zoning, building, use and health regulations.

In 1956, the parcels were subdivided into seven lots. Adjacent to these lots is a piece of land known as the Southern California Edison right-of-way. Plaintiff,

"This placed defendant City in the position of having to proceed with the presentation of evidence on its cross-complaint. The first witness that the City called was the plaintiff, Donald R. Plunkett, under Evidence Code Section 776. It was stipulated by his attorney that he was the plaintiff and cross-defendant. The city attorney then asked the plaintiff if he were the owner of the lots mentioned in the cross-complaint. At this point, the plaintiff refused to answer on the ground that any answer that he might give would tend to incriminate him, and that he claimed his constitutional rights under the Fifth Amendment.

. . .

"Both in chambers on the day before evidence began and in open court, the Court, laboring under the impression that the [plaintiff], in good faith, would want to prove to the Court that the property was in compliance with the city ordinances, suggested that the court, with the attorneys and the plaintiff, view the premises. This met with an adamant refusal on the part of the plaintiff. . . .

"[T]he entire case of the plaintiff consisted of a massive effort either to exclude the City's evidence entirely or to cast some aspersions upon the evidence which the City produced, or upon the City officials who gathered it. In short, it was tried as criminal cases are often tried—that is, with no evidence being given by the defendant or on his behalf (in this case, the plaintiff), the strategy being to exclude, reduce or impair the evidence of the prosecution just enough to create a reasonable doubt.

". . . After the Defendant/Cross-Complainant City had concluded its evidence and rested, the plaintiff again had an opportunity to offer rebutting testimony, there was not one word of testimony by or on behalf of the plaintiff to the effect that the alleged violations did not exist. . . . As it did quite often during the trial, the Court again emphasizes that it should be remembered that this is not a criminal trial. This is a civil trial . . . in which no money penalties or damages or expropriations of property, or title to property are being sought by either side . . . Even more productive of amazement is the fact that it was the plaintiff, Mr. Plunkett, who instituted this litigation, and that the City's cross-complaint was triggered by the lawsuit filed by Mr. Plunkett."

over the years, has had a license from the Edison Company to graze animals. The license, most recently renewed by a January 1973 written agreement, limits the number of animals that plaintiff can maintain on the property. It appears that the grazing of animals is no longer an issue in this case.

During the period that the property was in unincorporated county territory, the county building ordinance prohibited building construction without a permit and occupancy without a final inspection. The county code defined and regulated dwelling houses, accessory buildings and garages, and also required a permit to build a swimming pool. Under the county zoning, plaintiff was permitted only one single family residence for each 5000 square feet of buildable lot area. There were also restrictions on the renting of rooms to boarders and the use of detached living quarters for temporary guests. The county ordinance required at least one automobile storage space accessible from the street and limited the capacity of garages or carports to three automobiles.

Between 1947 and 1953, plaintiff built, with county approval, six single family residential houses and garages and one house and garage to which he was entitled to county approval.

The county had also approved several other structures on plaintiff's property. Plaintiff also built a number of "garages," for which he had obtained building permits, but had not obtained a certificate of occupancy, after a final inspection. These garages and rooms in the houses were used for multiple residential purposes.

When the property was annexed by defendant City, plaintiff knew that he was using his property in violation of county regulations, having been advised in writing on several occasions that such uses were illegal. These uses were also illegal under the city code.

When the findings were signed, plaintiff was renting rooms and apartments created from the houses and garages on his property, and had constructed several buildings without a permit in violation of side and backyard requirements.

Plaintiff at all times was well aware of the applicable County Ordinances and City Code. He presented no evidence whatsoever that any of the illegal uses were valid, nonconforming uses. Plaintiff constructed a four foot chainlink fence in violation of the 42″ height limitation of the city and also constructed a 6′ fence in violation of applicable laws "with the purpose and intent of maintaining therein his own domain, immune from City regulation, inspection or City laws." There was no evidence that the city was harassing plaintiff; to the contrary, the city demanded only reasonable compliance with its building and zoning laws. Plaintiff was twice found guilty in the municipal court of violating defendant's code, but did nothing to correct the violations. The continual maintenance by plaintiff of the structures and uses in violation of the Municipal Code is a public nuisance.

Plaintiff was, in short, enjoined from continuing his illegal uses.

Plaintiff owned a water system known as the Plunkett Company for which he had obtained a certificate of public convenience and necessity from the Public Utilities Commission. The water company is a privately owned public utility. Plaintiff provided service to a nursery for two months in 1972. Then the nursery

obtained water service from defendant City. Plaintiff never dedicated his facilities to the public use and defendant City did not extend its water service to any area dedicated to the public use by plaintiff.

The judgment provides, in summary, that plaintiff is enjoined from constructing, using, occupying or maintaining more than one single family residence on any of the seven lots; must provide for each lot a garage or carport with at least two storage spaces; must provide in connection with the construction of any new building or alteration of an old building a side yard and rear yard in accordance with the city's code; must, after the present license to use the Southern California Edison Company right-of-way expires, maintain animals on such property only in accordance with the city's code; may not occupy any building or structure unless and until a certificate of occupancy is obtained; may not use the properties for other than a single family residence with specified limitations on roomers or boarders; must reconvert several former garages to garages; must remove a carport installed so that the use of a garage is not blocked; must remove a solid wall illegally built; and must obtain a permit for a swimming pool on the premises.

DISCUSSION

The bulk of plaintiff's brief on appeal is devoted to challenging evidence allegedly obtained in violation of his constitutional right. None of his contentions has merit.

1. *Testimony of Charles Chivetta*

In May or June 1971, Charles Chivetta, Director of Community Development for defendant city, met with the city attorney, plaintiff, and plaintiff's attorney

to discuss the problems concerning plaintiff's property. Plaintiff's attorney suggested, without any objection from plaintiff, that they should all meet on plaintiff's property at a certain time. At that time Chivetta inspected the premises. At trial, he testified to his observations in walking through the property.

Plaintiff contends that this evidence was inadmissible because Chivetta's observations were made in connection with a possible compromise of plaintiff's difficulties with defendant city. Plaintiff relies on Evidence Code section 1152, which makes inadmissible evidence that a person has, "in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act or service to another who has sustained or will sustain or claims that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, . . ."

There is no merit to plaintiff's contention. We leave aside whether section 1152 could ever apply in a situation like this. That the negotiations between plaintiff and defendant themselves constituted an attempt at a "compromise," reflects only plaintiff's later characterization of events. All the evidence shows is that defendant, consistent with the standard procedure in enforcing zoning laws insisted on examining the property to determine precisely what violations existed and what would have to be done to obtain compliance.

2. *The Helicopter Overflights*

In November 1969, Michael White, an assistant to Chivetta, while making a general aerial patrol of the city, noticed structures on plaintiff's property which appeared to fill yard areas that were required to be

unobstructed. In 1970, he flew over plaintiff's property in a police helicopter and then made another flight to take photographs.

There is no merit to plaintiff's contention that the overflights constituted an invasion of his privacy. First, the initial patrol overflight was not a search. (*People v. Superior Court* [Stroud] (1974) 37 Cal.App.3d 836, 839; *Dean v. Superior Court* (1973) 35 Cal.App. 3d 112, 117-118.) Moreover, plaintiff cannot have a reasonable expectation of privacy with respect to objects as conspicuous as garages and residence (*People v. Mullins* (1975) 50 Cal.App.3d 61, 68-69; *Dean v. Superior Court, Supra,* 35 Cal.App.3d at pp. 117-118; cf. *People v. Sneed* (1973) 32 Cal.App.3d 535, 542-543.)

Observations From Edison Property

Charles Chivetta photographed the rear of plaintiff's property from the Edison right-of-way. Plaintiff contends that evidence based on Chivetta's observations and photographs from the Edison right-of-way should have been suppressed because the city obtained the Edison Company's consent by coercion. There is no merit to that contention. Charles Chivetta wrote to John Overmeyer, a representative of the Edison Company and informed the Edison Company, in substance, that plaintiff was unlawfully keeping horses on property controlled by Edison and if the city were to file a complaint, Edison would be named as a party. Rather than coercion, the Edison Company's willingness to permit defendant's representative on its property reflects only a desire to obey the law or a desire to cooperate with the city because the company knew it was not disobeying the law.

Exclusion of Evidence

Plaintiff's theory throughout was that he had been the subject of discriminatory enforcement of zoning violations. In this connection, Charles Chivetta testified that after an initial building permit has been issued, the procedure "within the last year and a half or two years is, where practical" again that the building clerk would check the files to determine which permits were "not finaled" and the inspector would then send a notification to the property owner. Plaintiff's attorney asked Chivetta whether the city had "brought any actions, civil action, to force persons to get final permits when those persons have not been notified by mail under your notification system to get a final permit?" Defense counsel objected; the objection was sustained.

Contrary to plaintiff's contention, the trial court properly excluded the evidence under section 352 of the Evidence Code. The relevance of the evidence was, as the trial court said, "very tenuous, if any, . . ." Assuming that the evidence would have shown that defendant city never brought a civil action to require persons to get a final permit without first notifying those persons by mail, that would have made no difference to this case. Defendant city never filed an action against plaintiff in this case; when it responded by answer, affirmative defense and cross-complaint to the action filed by plaintiff, the parties were well past the notification stage. Besides, the city's request for injunctive relief in the form of requiring plaintiff to obtain final permits was only one part of a package of relief sought in face of plaintiff's obdurate use of his property in violation of applicable zoning, building use and occupancy regulations and loss.

Statute of Limitations and Laches

There is no merit to plaintiff's contention that the city's cross-complaint was barred by the statute of limitations. Where continuing zoning violations are involved, the statute of limitations does not run against a public agency. (*Fontana v. Atkison* (1963) 212 Cal.App.2d 499, 509.) Plaintiff also contends that the city's action is barred by the equitable doctrines of laches, estoppel, unclean hands and economic waste. None of these claims have merit.

First, there is no evidence that any city official was aware of the violations in 1962. Apparently, it was not until Michael White's helicopter flight in 1969 that the violations became apparent. This was at least in part because plaintiff had built a high fence to prevent anyone from seeing what he was doing with his property.

Although plaintiff complains that some records are gone, he does not explain how he has been adversely affected.[2]

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[2]Although plaintiff does not sort out the details of the injunctive relief granted to defendant, in fact that relief relates chiefly to enjoining plaintiff from continuing to use his property for multiple residence uses. Thus, whether as plaintiff contends, certain permits might have been lost, would not justify a court in permitting plaintiff to continue with his illegal use of the property. Besides, plaintiff never offered any evidence whatsoever to suggest that he was, in fact, issued any final permits, the record of which the city has lost.

Plaintiff's assertion that his hands are clean and the city's dirty, is totally contrary to the record which shows, at worst, that defendant city once served a search warrant on plaintiff which turned out to be not in legal form. The warrant was never executed and any impropriety in connection with its issuance did not result in evidence offered in this case. Rather, the record shows plaintiff's continuing refusal to abide by any law concerning the use of his property with which he disagrees. Finally, there is no evidence that plaintiff is being required to "remove and destroy buildings constructed according to pre-

Nonconforming Use

Plaintiff contends that he has a valid nonconforming use. Plaintiff appears to be referring to first, a second garage which blocks the usability of another garage for its lawful purpose; second, the requirement that garages be used for garage purposes; third, the requirement that each lot be provided with a usable two-car garage; fourth, the requirement that he remove a chainlink fence; fifth, the requirement that he restore a gate between two lots; and sixth, the requirement that he remove any structure which prohibits a five foot side yard. Plaintiff contends that these structures all conform to Los Angeles County zoning ordinances.

First, whether or not any of plaintiff's uses and structures were lawful when his property was subject to Los Angeles County regulations, plaintiff exaggerates the scope of the judgment enjoining him from certain activities. He is required to provide for side yards and back yards only when he alters or adds buildings. He is required only to close existing gates and community facilities. He is required to remove all chainlink fencing in excess of city height limits, only if he does not obtain a conditional use permit.

Second, contrary to plaintiff's assertions, his use of garages as apartments and conversions of those garages to apartments or other multiple family uses was never lawful, and the county required that each residence have a garage or carport with access to the street. Third, with respect to the city's requirement of two-car garages, plaintiff offered no evidence from which

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existing code provisions. . . ." He is being asked to remove a chainlink fence and a brick wall. His assertion that removal of those structures "serves no purpose" is just a restatement of plaintiff's disagreement with the zoning and building laws.

it could be concluded that such requirement would be burdensome. Indeed, for all we know, plaintiff's illegally converted garages may, when restored to their lawful condition, satisfy city requirements.

Compensation for Taking of "Public Utility"

There is no merit to plaintiff's contention that he was entitled to compensation as a privately owned public utility when the city extended service to an area which he claims as his service area. (See Pub. Util. Code, §§ 1501-1506.)

To be entitled to compensation, plaintiff was required to show that the "service area" of which he was deprived was served by a privately owned public utility in which the facilities had been dedicated to public service, and in which he was required to render service. (Pub. Util. Code, § 1502, subd. b.) Plaintiff made no such showing.

We note, in closing, that plaintiff's contention that the evidence does not support the finding that his premises are a nuisance is frivolous.

Affirmed.

NOT FOR PUBLICATION.

Kaus, *P. J.*

We concur:
Stephens, *J.*
Ashby, *J.*

Homer H. Bell, Judge

Superior Court of Los Angeles County

Donald M. Re, Attorney for Plaintiff, Cross-Defendant and Appellant, Donald R. Plunkett.

John Sanford Todd, City Attorney, for Defendant, Cross-Complainant and Respondent, City of Lakewood.

APPENDIX B.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102.

Jan. 19, 1978.

I have this day filed Order

Hearing Denied

In re: 2 Civ. No. 49610, Plunkett vs. City of Lakewood.

Respectfully,

G. E. Bishel
Clerk

IN THE

Supreme Court of the United States

October Term, 1977

Docket No. 77-1479

DONALD R. PLUNKETT,

Petitioner,

vs.

CITY OF LAKEWOOD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT.

RESPONDENT'S BRIEF IN OPPOSITION

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City Attorney and
Attorney for Respondent

LONG BEACH REPORTER

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, City of Lakewood, California, a municipal corporation, prays that the Petition for Certiorari be denied.

OPINION BELOW

The opinion that the Petition for Writ of Certiorari seeks to review (Petitioner's Appendix A) is unreported, and has not been certified for publication. As a nonpublished opinion, under California Rules of

Court 977, the same shall not be cited by a court or party in any other action or proceeding, except when the opinion is relevant under the doctrine of the law of the case, or *res judicata* or collateral estoppel are involved. The decision of the Second Appellate District of the California Court of Appeal, 2 Civ. 49610, was rendered following judgment in favor of the City of Lakewood in two separate Los Angeles County Superior Court cases, Donald R. Plunkett vs. City of Lakewood, Los Angeles County Superior Court Case No. SE C 8296, and Donald R. Plunkett vs. City of Lakewood, Los Angeles County Superior Court Case No. SO C 24763. The unanimous decision was filed November 15, 1977, and became final thirty days thereafter, or on December 15, 1977.

JURISDICTION

The court has jurisdiction to review said decision by Writ of Certiorari under *28 U.S.C. 1257(3)* if the petition was timely filed. The judgment of the Court of Appeal of the State of California became final on December 15, 1977, and the Petition for Certiorari was filed April 18, 1978, more than ninety days thereafter.

QUESTIONS PRESENTED

The court is presented by the filing of the Petition for Certiorari on April 18, 1978, with the question of whether the same was timely filed. In addition, Petitioner in his application for a Writ of Certiorari

raises certain questions presented for review which are hereby restated to fit the facts of the case:

1. Whether Respondent's observations and photographs taken of Petitioner's improved real property from adjoining public street rights-of-way and Southern California Edison property, with the permission of the owner thereof, was an unreasonable search under the Fourth Amendment.

2. Whether Respondent's observations and photographs taken from helicopter overflights of Petitioner's real property was an unreasonable search under the Fourth Amendment.

3. Whether Respondent in inspecting Petitioner's real property made an unreasonable search within the meaning of the Fourth Amendment.

4. Whether Petitioner was deprived of property without due process of law, or denied the equal protection of the laws, by the City's enforcement of its zoning laws as to him.

5. Whether Petitioner was deprived of due process of law, and denied the equal protection of the laws, by the court determining in its discretion under *California Evidence Code §352* to exclude evidence where its probitive value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice of confusing the issues, or misleading a jury.

STATEMENT OF FACTS

Petitioner's statement of the case is inaccurate, misleading, and contrary to the evidence and Findings of Fact of the trial court. The facts relevant to the questions presented by Petitioner in his Application for a Writ of Certiorari, and upon which both the trial judgment, the opinion of the Court of Appeal, and the decision of the California Supreme Court denying plaintiff's Petition for Hearing are based, are summarized as follows:

I. Introduction

The case of *Donald R. Plunkett vs. City of Lakewood*, Los Angeles County Superior Court Case No. SO C 24763, and *Donald R. Plunkett vs. City of Lakewood*, Los Angeles County Superior Court Case No. SE C 8296, were consolidated for the purpose of trial and tried before the court without a jury, the Honorable Homer H. Bell, Los Angeles County Superior Court Judge presiding, commencing January 6, 1975, and concluding April 3, 1975. In these cases Petitioner sought to enjoin the Respondent City from prosecuting him for violating any law, including the building and zoning codes of the City. In addition, Petitioner sought to enjoin the City from providing water services allegedly in duplication of a water system owned and operated by Petitioner. The Respondent City cross-complained against Petitioner, seeking to enjoin Petitioner from maintaining any multiple family use on the premises owned by him, and described generally as

Lots 1 through 7, 6101, 6107, 6113, 6117, 6123, 6129 and 6133 North Ibbetson, City of Lakewood, County of Los Angeles, State of California. In addition, Respondent City sought a mandatory injunction requiring Petitioner to remove from said premises certain structures built thereon in violation of the zoning and building codes of the City of Lakewood, or, in the alternative, to obtain in some instances building permits or authorizations for said structures after inspection and compliance with the building code. After trial of the matter, and denial of Petitioner's Motion for a New Trial, judgment was entered in favor of Respondent City of Lakewood and against Petitioner on each of said complaints and, in addition, judgment was entered in favor of the Respondent City on its cross-complaint.

At the conclusion of the trial Judge Bell prepared a Written Announcement of Intended Decision (Clerk's Transcript - pp. 948-996). The trial judge pointed out the trial was rendered novel, if not bizarre, by the fact that Plaintiff who brought the action failed to go forward with his case, and that the first witness called by the City was the Plaintiff, Donald R. Plunkett, who when asked whether he owned the property in question refused to answer on the ground that his answer would tend to incriminate him. The trial judge then pointed out that he was laboring under the impression that the plaintiff in good faith would want to prove to the court that his property was in compliance with City ordinances, and suggested that the court, with attorneys and

plaintiff, view the premises. The judge pointed out this was met with an adamant refusal on the part of Petitioner. The trial court then pointed out that the City proceeded to present its evidence through its witnesses, together with documents, diagrams, charts, pictures, and the plaintiff never again resumed the stand. The trial court also pointed out (Clerk's Transcript - pp. 951-952) that Respondent City produced overwhelming amounts of evidence, and it was abundantly clear that the City had explored every avenue of proof available to it, and had competently proved every allegation and violation charged by the City. The court stated that proof of all of the substantive issues was 100% produced by the City, and that plaintiff did not offer any evidence tending to show that as a substantive matter the City's charges were not true. The court stated the entire case of the Petitioner consisted of a massive effort to exclude the City's evidence entirely, or to cast some aspersions upon the evidence which the City produced, or upon the City official who gathered it.

The Second Appellate District of the California Court of Appeal in its unanimous decision by Presiding Justice Kaus, pointed out that the trial court filed two hundred pages of Findings of Fact and Conclusions of Law, resulting in a seventeen page judgment in favor of the City, but that on appeal Petitioner paid no attention whatsoever to the two hundred pages of Findings of Fact and Conclusions of Law. These Findings of Fact, not having been disputed, were accepted by the Appellate Court in the

opinion set forth in Appendix A as its own Statement of Facts.

Therefore, in a case where Petitioner refused to present any evidence, or rebut the evidence presented by the City, and where the Petitioner on appeal has failed to attack the Findings of Fact, the evidence properly received by the court must be accepted as true, and as so found in said Findings of Fact. (*Pennekamp vs. Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295)

Petitioner in his statement of the case has failed to correctly and accurately set forth the facts overwhelmingly established in the trial of this case. What he has presented in this Petition is a characterization of facts to fit Petitioner's imagined and manufactured constitutional transgressions by Respondent City. As the Court of Appeal found, these contentions are without merit. Firstly, the evidence before the trial court established that Petitioner was well aware of applicable county and city ordinances, but Petitioner presented no evidence whatsoever that any of the illegal uses of his property were valid nonconforming uses (Page 7 of the Opinion, Appendix A). Secondly, even though Petitioner was twice found guilty in the Municipal Court of violating Respondent's code, he did nothing to correct the violations (Court of Appeal Decision, page 8, Appendix A). Thirdly, there was no evidence that the City was harassing Petitioner and, to the contrary, the City demanded only reasonable compliance with its building and zoning laws (Page 8 of the Appellate Opinion, Appendix A). Lastly,

Petitioner came into court seeking injunctive relief, alleging his structures were valid and noncomforming, and yet refused to allow the court to inspect his premises, or to even testify on his own behalf, or when called under *Evidence Code §776.*

2. Prior to September 25, 1962.

Petitioner owned seven lots in the unincorporated territory of the County of Los Angeles, State of California, subject to the County's building and zoning laws, and on each lot built one single-family residence. Testimony established that Petitioner maintained the aforementioned property in violation of the County building and zoning laws prior to the time it was annexed to the City of Lakewood in 1962, in that there were many violations on said property at the time of said annexation. In addition, the evidence established that prior to said annexation the existence of some of these violations were known to County officials and, in one case in 1962 prior to said annexation, *People vs. Plunkett, Los Cerritos Municipal* Court Case No. M 14281, Petitioner was found guilty of the charge of not providing on said premises garages for the storage of automobiles.

3. November 17 or 18, 1969.

Petitioner's property was annexed to and included within the municipal incorporation limits of the City of Lakewood on November 25, 1962, but said buildings or structures remained more or less unnoticed from

official scrutiny, inspection or investigation, until about November 17 or 18, 1969, when Michael White, a young planning intern of the City of Lakewood, in making an aerial survey of the entire City observed structures and a swimming pool covering the rear of Petitioner's Lots 1 through 7. When Michael White returned to his office he found there were no building permits for these structures, and on November 20, 1969 he and another City official sought permission to enter said premises, and were denied permission by Petitioner. They tried again to enter the premises on November 21, 1969, and again were denied permission. They did not on any occasion enter said premises without permission. Thereafter they applied and received from the Los Cerritos Municipal Court a warrant to inspect the premises pursuant to *California Code of Civil Procedure §1822.50.* At the appointed time Michael White and Lee Renison went to the premises of Petitioner, and requested Petitioner to open gates at the rear of the premises to allow them to inspect the premises. Petitioner, however, refused to allow them to enter the premises, and Petitioner was then cited by a law enforcement officer of the City of Lakewood. Neither Michael White nor Lee Renison, nor any other City official, attempted to or did enter said premises when refused permission by Petitioner. On March 30, 1970 Judge Landis of the Los Cerritos Municipal Court found Petitioner guilty under *§1822.57 of the Code of Civil Procedure* for refusing to allow said inspection, People vs. Plunkett, Case No. M 37030, and thereafter suspended Petitioner's sentence, and placed him on summary pro-

bation on condition that he provide entrance to the property to Michael White for the purpose of inspecting the same as to compliance with the City's building and zoning laws. Rather than complying with the condition of probation Petitioner filed suit in the Los Angeles County Superior Court, in the case of *Plunkett vs. the Municipal Court and John C. Landis*, seeking an alternate writ which was never heard, and went off calendar when Petitioner's conviction in case No. M 37030 was reversed by the decision of the Los Angeles County Superior Court Appellate Department in case No. CRA 9491. Petitioner's conviction was reversed on the basis that the inspection warrant originally issued was too broad, and did not limit the inspection to building and zoning violations.

Contrary to Petitioner's erroneous statement, no inspection warrant was ever quashed nor did any court refuse to issue an inspection warrant. All that happened in respect to the matter of the inspection warrant issued by Judge Bigelow in 1969, was simply that it was never executed. Inasmuch as Petitioner Plunkett refused to honor the warrant no one ever went on the property, and Mr. Plunkett's rights were never violated. What did happen was that when Mr. Plunkett was arrested and found guilty of the charge of not honoring the warrant, (which was later set aside on the basis the warrant was defective) no inspection was ever sought or accomplished under such a defective warrant.

4. People vs. Plunkett, Case No. M 39760.

Between November 28, 1969 through June 16, 1970 there were negotiations between Judge Landis of the Los Cerritos Municipal Court, Petitioner Plunkett and his then attorney, and the City pertaining to inspection of his premises. These negotiations broke off when the Petitioner filed a suit for an alternate writ in the aforementioned case of *People vs. Municipal Court and John Landis.* Thereafter, on August 18, 1970 Michael White filed a complaint in the Los Cerritos Municipal Court charging Petitioner Plunkett with violation of the City's zoning ordinance by failure to provide the required yards, and maintain single-family residences thereon, in the case of *People vs. Plunkett*, Case No. M 39760.

In the jury trial of *People vs. Plunkett* it was established that Michael White observed the aforementioned property both from the ground and two helicopter flights during the summer of 1970; that the observations from the ground were made from the public streets in front of the property in question, and from the Southern California Edison property to the rear with the permission of the Southern California Edison Company and accompanied by a representative of that company. The constitutional questions raised herein were raised in that trial, and the court ruled against Petitioner. A jury found Petitioner guilty on all counts on February 16, 1971.

5. Plunkett vs. Lakewood.

The aforementioned jury trial involved only a portion of the zoning violations found to exist in the case of *Plunkett vs. Lakewood.* In June of 1971 the City Attorney and Charles Chivetta, the City Director of Zoning and Building, met with Petitioner on his property in the presence of his then attorney, and at the request of the attorney and Petitioner. At that time Mr. Chivetta toured Petitioner's property and noted certain violations and corrections that had to be made in connection with the building and zoning laws. In 1972 Mr. Chivetta caused an aerial survey of the entire City to be photographed and thereafter maintained these photographs in his office to assist persons with building applications, and in preparing planning and zoning matters.

At the trial it was established, and the court found, that the City of Lakewood maintained a helicopter police patrol for law enforcement purposes known as the "Sky Knight", which has received nationwide publicity. Under this program the City owns three helicopters and hires its own pilots to fly the helicopters. The City, which contracts with the Los Angeles County Sheriff's Department for all law enforcement functions, provides observers for the helicopters through the Los Angeles County Sheriff's Department. This helicopter patrol service is also provided by the City of Lakewood by contract to the surrounding cities of Cerritos, Hawaiian Gardens, Artesia, Bellflower, and Paramount. It was established at the

trial that the helicopter is a routine day and night Sheriff patrol that has flown over all parts of the City, including Petitioner's property, at least five hundred times.

There was no evidence in this case that any official of the Respondent City went on or into Petitioner's property without his consent. Petitioner seeks to have this court believe that Respondent officials went into Petitioner's property without the consent or permission of the land occupier. This is not true. It was established that Chivetta and the City Attorney went on and into Petitioner's property, but in the presence and with the permission and consent of Petitioner and his attorney. At that time the parties entered only those buildings or structures that Petitioner agreed to and did open to them. Petitioner, as the owner of said property, was the person to determine whether or not he had the consent of his tenants to do so.

6. Utility Right-of-Way

What Petitioner describes as the "utility right-of-way" is in fact a parcel of land to the west and abutting the rear of Petitioner's seven lots, consisting of a 175 foot wide strip of land owned in fee by the Southern California Edison Company, a public utility, and sometimes called the Edison right-of-way. This strip of land is utilized by the Southern California Edison Company for maintaining towers and electrical transmission lines to transmit high voltage electricity from its power plant at Seal Beach to various portions

of Southern California. The trial court found, and Petitioner has failed to refute this finding, that Petitioner's sole interest in the Southern California Edison Company property is under a license agreement issued by the Southern California Edison Company, revocable at any time on thirty-days' notice by Southern California Edison Company for any reason whatsoever, and that said agreement was never recorded and did not constitute an interest or easement in real property, and merely conferred rights that are almost revocable at will. (Finding of Fact No. 11, Clerk's Transcript Page 999). The trial court also found that Petitioner's rights under the license agreement were nonexclusive, and were subject to the rights of the Edison Company, the trial court finding that Petitioner merely had the right from the license agreement to go on Edison Company property for the purpose of pasturage and beautification of the land (Finding of Fact No. 11, Clerk's Transcipt Page 999). The trial court further found that petitioner had no right, title or interest pursuant to said license to maintain thereon any structure, driveway or access. In addition, the trial court found that City offiicals had gone on to said right-of-way with the permission and in the presence of representatives of the Southern California Edsion Company, and had observed the rear of Petitioner's property from said right-of-way, the court finding that this observation was no different than any observation of Petitioner's property that would be made by anyone else, including Edison Company employees, rightfully on said right-of-way.

7. Building and Zoning Violations.

The trial court found that Petitioner, prior to the annexation of his property to the City, and after the annexation of his property to the City, to and including time of trial, maintained on said seven lots an interconnected multiple-family residence in violation of the County and City zoning ordinances restricting each lot to one single-family residence (Finding of Fact No. 19, 20, 36, 42, and 48; Clerk's Transcript, pages 1001, 1002, 1011, 1014-1016, and 1020-1028). In addition the trial court found that commencing in June of 1956 to the present time Petitioner had in many instances requested and obtained from the County, or the City as its successor in interest, a permit to build a structure, usually a garage, but had never completed the structure in accordance with the permit, or requested, as required by the City in its building codes, final inspection. The trial court further found that many of these structures, usually structures for which a garage permit had been obtained, had contrary to the City and County building codes been converted to living quarters, which Petitioner rented for occupancy even though Petitioner had never received or called for a final inspection, or received a Certificate of Occupancy, and that such use and occupancy was void and illegal. (Findings of Fact No. 25-26, 36, 44, 48, Clerk's Transcript pp. 1004, 1010-1012, 1017-1028). In addition, the trial court found that there were many other structures on said lots built maintained and occupied without any building permit or au-

thorization, and that the maintenance of buildings or structures without a building permit or final inspection was a nuisance, which should be abated. (Finding of Fact 47, Clerk's Transcript p. 1020). The trial court also found that Petitioner was at all times well aware of the provisions of the County and City ordinances, and of the necessity of obtaining building permits to construct, maintain or convert structures, and of the necessity of complying with building and zoning laws of both the County of Los Angeles and its successor, the City of Lakewood, and being fully aware of these provisions, and with knowledge thereof, had intentionally, openly and flagrantly violated the terms and provisions of said ordinances and laws. (Finding of Fact 49, Clerk's Transcript p. 1028). In addition, the trial court found that Petitioner has repeatedly since 1961 refused to allow both County and City officials on reasonable request, or pursuant to orders of the Municipal Court on at least five or six occasions, to come onto Petitioner's property to inspect the property at reasonable times for the purpose of determining compliance with the County and City building and zoning ordinances (Finding of Fact 50, Clerk's Transcript p. 1029). The trial court also found there was no evidence that the Respondent City was harassing the Petitioner, and found, in fact that the City had done equity, and sought relief in its cross-complaint in a fair and equitable manner; that in fact all the City sought was reasonable compliance with its building and zoning laws. The trial court found on the other hand that Petitioner had failed and refused to comply with the

County and City zoning and building ordinances, to honor a City inspection warrant issued by the Municipal Court, to honor orders of Judges of the Municipal Court that Petitioner allow the City to inspect the property, and even to allow the trial judge himself to inspect the property, the trial court pointing out that Petitioner in this case has presented no evidence that either the City or County ordinances were arbitrary, oppressive, discriminatory or void, or that he had a valid nonconforming or other right to use his property contrary to said ordinances (Findings of Fact 55-56, 68, 74, Clerk's Transcript pp. 1030, 1035-1036).

8. Judgment of Trial Court.

Judgment of the trial court is summarized on pages 8 and 9 of the Opinion on Appeal set forth in Appendix A. The trial court in issuing said judgment found that the remedy of criminal proceedings instituted by County officials when the property was in unincorporated territory, and instituted by the City after the property was annexed to the City of Lakewood, had proved inadequate, and that the violations continued unabated, necessitating the civil remedy of injunctive process (Finding 81, Clerk's Transcript p. 1038).

9. Other Litigation.

Petitioner makes reference in his statement of the case to other litigation pertaining to the subject mat-

ter of this case in federal court (Petition for Writ of Certiorari, page 11). After Petitioner's conviction by a jury of violating the Lakewood municipal zoning law, in the case of *People vs. Plunkett*, Los Cerritos Judicial District Case No. M 39767, was affirmed by the Appellate Department of the Los Angeles County Superior Court, Petitioner applied for a writ of habeas corpus in the case of *Plunkett vs. Municipal Court of the Los Cerritos Judicial District, County of Los Angeles, State of California*, United States District Court, Central District, Case No. 72-1933-RJK. In that case Petitioner claimed his rights under the Fourth and Fourteenth Amendments had been violated by reason of evidence procured and used in the Municipal Court case, photographing Petitioner's property from police helicopter without an inspection warrant allegedly required by the *Code of Civil Procedure §§1822.50, et seq.* By reason of a temporary restraining order issued in that case enforcement of the Municipal Court judgment was restrained until October of 1977, when Judge Robert J. Kelleher on the petition of John K. Van de Kamp, District Attorney of Los Angeles County, and city prosecutor of the City of Lakewood, entered an order denying the petition for habeas corpus and dismissing the same, as well as the restraining order, on the basis of *Stone vs. Powell* (1976) 428 U.S. 465, 49 L.Ed.2d 1067, 98 S.Ct. 3037. Since that date Petitioner has paid the fine imposed to the Los Cerritos Municipal Court, but as of February, 1978, further proceedings were still pending in the Los Cerritos Municipal Court.

In the case of *Donald R. Plunkett vs. John Sanford Todd, et al*, filed on May 23, 1975 in the United States District Court, Central District of California, Petitioner sought damages under the *Civil Rights Act, 42 U.S.C. 1983*. In that suit Petitioner raised the same issues raised in the Municipal Court and in the Superior Court trial, and now raised in his Petition for a Writ of Certiorari. On motion for summary judgment the United States District Court on Ocotber 20, 1975, entered its judgment for the defendant Todd, et al on the basis that there were no genuine issues as to any material fact, the plaintiff had no claim against the defendants, or any of them, and further that the court under the doctrine of abstention should not entertain jurisdiction. Plaintiff appealed said judgment to the Ninth Court of Appeals for the Ninth Circuit, No. 75-3729. Briefs have been filed and the matter is awaiting setting for hearing on appeal.

ARGUMENT

I. The untimely filing of the petition deprives this court of jurisdiction over the case.

The Petition for Writ of Certiorari is plainly out of time. The judgment of the Second Appellate District of the Court of Appeal of the State of California was filed on November 15, 1977. *California Rules of Ct. 24(a)* provides that the decision of the Court of Appeal becomes final as to that court thirty days after filing (*6 Witkin, California Procedure (2d), Appeal, p. 4462*). The judgment for which review is sought

became final December 15, 1977. Rehearing was sought and denied. Hearing in the California Supreme Court was also denied, as set forth in Appendix B. Thus pursuant to the command of *28 U.S.C. ¶2101(c)*, the Writ of Certiorari had to be sought "within ninety days after the entry of such judgment or decree" — in other words by no later than March 15, 1978. In this case no extension of the filing deadline was sought or obtained from a Justice of this court, and the petition was actually filed in this court on April 18, 1978. Where as here the time for filing a petition is established by an Act of Congress rather than a rule of this court, such an untimely filing has consistently been held to be a jurisdictional defect, making it impossible for the court to waive the untimeliness to entertain the petition, and requiring the court to dismiss the petition for want of jurisdiction. (*Walter D. Teague III vs. Regional Commissioner of Customs* [1969] 394 U.S. 977, 22 L.Ed.2d 756, 89 S.Ct. 1457).

This rule has been explained succinctly by Professor Witkin in Volume 6 of *Witkin on California Procedure* (*2d*) at page 4463, as follows:

> "The United States Supreme Court may review a final judgment of a state appellate court, but its test of finality for this purpose is the rendition of a final appellate decision on the issues — usually the date of filing of the opinion. Hence, even though the period for rehearing or hearing in the California Supreme Court has not elapsed, the time runs. But the subsequent granting of a hearing or rehearing in the California Supreme

> Court will, of course, destroy the previous finality, and a new period will start when the new final decision is rendered.
>
> "The rule was explained in *Market St. Ry. Co. vs. R. R. Com.* (1945) 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171, an appeal from the California Supreme Court. The opinion states that finality 'is not controlled by the designation applied in state practice', and adds: 'the judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment . . . . . Such latent powers of state courts over their judgments are too variable and indeterminate to serve as a test of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run. A timely petition for rehearing defers finality for our purpose until it is acted upon or until power to act upon it has expired . . . . . If rehearing is granted, the judgment is opened, and does not become final as a prerequisite to application for review by us until decision is rendered upon rehearing.' (65 S.Ct. 773, 89 L.Ed. 1176, 1177)"

2. The decision is obviously correct and involves no conflict of opinion or other basis for review by this court.

Even apart from the untimeliness of the petition, no reason is apparent for review of the decision of the Califorina Court of Appeal. From our corrected

statement of the case it is apparent that the state court has not decided a federal question of substance not heretofore determined by this court, nor has the state court decided it in a way that would not be in accord with the decisions of this court.

The California Court of Appeal, in the opinion for which review is sought, pointed out that on appeal Petitioner paid no attention whatsoever to two hundred pages of Findings of Fact and Conclusions of Law, and by reason of this failure of Petitioner to object to the same the Appellate Court accepted those Findings as the basis of its own statement of facts. The facts as summarized, pages 3 through 9 of the Opinion, Appendix A, are as found by the trial court in its Findings of Fact, and as set forth in Respondent's Statement of Facts, supra.

It is well established the facts found by the lower court, and adopted by the highest court of the state, when supported by competent testimony, will not ordinarily be examined by the United States Supreme Court on writ of error (*Portland R. L. P. Co. vs. Railroad Commission*, 229 U.S. 397, 33 S.Ct. 820, 57 L.Ed. 1248; *Whitney vs. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095). Only where Petitioner shows a federal right has been denied as the result of a finding being unsupported by the record or evidence, will the Supreme Court of the United States review findings of fact by a state court (*Fiske vs. Kansas*, 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108). Here Petitioner has in his statement of the case

alleged facts which are contrary to the statement of facts of the Appellate Court in the Opinion, and Petitioner has not alleged or shown wherein the findings and determinations of both the trial court and the Appellate Court were unsupported by evidence. Furthermore, as set forth in the Appellate Court decision, Petitioner failed to present any evidence to support his case, and also failed to attack the Findings of Fact and Conclusions of Law arising from the evidence produced by the City. As recently stated in *Time vs. Firestone* (1976) 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154, this Court normally accords findings of the state court deference in reviewing constitutional claims.

3. Respondent's Observations and Photographs of Petitioner's Improved Real Property from Adjoining Public Streets and the Southern California Edison Property were not an Unreasonable Search Under the Fourth Amendment.

The trial court found that when the Petitioner refused to allow city officials to enter his property there was no entry on his property by any city official or agent, nor was there any entry on Petitioner's property by any city official or agent by reason of the inspection warrant issued on November 28, 1969 (Finding of Fact 96, Clerk's Transcript p. 1131); that there was no entry or inspection, or attempt to enter and inspect, any of the land, building or property owned by the Petitioner or rented by the Petitioner, by any city official or agent after they were refused consent to enter therein (Finding of Fact 97, Clerk's Tran-

script p. 1131); that city officials viewed and inspected Petitioner's premises from adjoining public streets, sidewalk and public property, and from the adjoining Edison Company property with the consent of the responsible manager of the Southern California Edison Company (Finding of Fact 98, Clerk's Transcript p. 1131); that Petitioner had a mere license revocable on thirty-days' notice for any cause to use the adjoining Edison Company property for the pasturage of a limited number of animals, and for beautification, and did not have any exclusive right of possession of said property, or the right to exclude agents of the Southern California Edison Company from said property, or agents of the city from entry thereon (Finding of Fact 99, Clerk's Transcript p. 1132). These Findings have not been attacked and were accepted by the court on appeal. Petitioner's statement of facts to the contrary at page 10, page 16, and page 17, must be disregarded. Both the trial court and the Appellate Court in its opinion, Appendix A at page 12, found and determined that there was no coercion on the part of the city in obtaining said consent, and that the observation of Petitioner's property from the Edison property was proper.

The trial court adhered to this court's decision in *Camara vs. Municipal Court* (1967) 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727, and *See vs. City of Seattle* (1967) 387 U.S. 541, 18 L.E.2d 943, 87 S.Ct. 1737, requiring the act of conducting tests or inspection on the premises to be supported by a warrant or consent, but pointed out that that requirement is inapplicable to a

seasonable search. This court in *Air Pollution Variance Board vs. Western Alfalfa* (1974) 416 U.S. 861, 94 S.Ct. 2114, 40 L.Ed. 607, pointed out that *Camara* and *See* are inapplicable where there is no invasion of privacy. In the *Western Alfalfa* case the field inspector did not enter the plant or offices, and merely observed the flues and smoke from an open area generally open to the public.

California decisions are in accord with the aforementioned views of this court. The California Supreme Court in *Dillon vs. Superior Court* (1972) 7 Cal.3d 305, 102 Cal.Rptr. 161, held there was no search where marijuana growing in the back yard was visible from the neighbor's second story window. The court there stated the test was whether the person had exhibited a reasonable expectation of privacy and, if so, whether that expectation had been violated by an unreasonable governmental intrusion. In *People vs. Mullins* (1975) 50 Cal. App.3d 61, 123 Cal. Rptr. 201, the court held that where the police had plain view of the contraband from a place in an area to which the occupant had exhibited no expectation of privacy, there was no search in the constitutional sense. The court pointed out that the applicable principle is stated in *Katz vs. United States* (1967) 389 U. S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, that what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. There the court stated that the question in each case becomes a weighing of the factual circumstances of the conduct to determine whether it was

reasonable to expect freedom from the particular observations that occurred.

4. Respondent's Observations and Photographs taken from Helicopter Overflights of Petitioner's Real Property were not a Search.

Again Petitioner, commencing at page 12 of his Application for a Writ of Certiorari, misstates the facts. Firstly, the trial court found and determined that the City of Lakewood had maintained a helicopter police patrol for law enforcement purposes as far back as 1965, which patrol not only patrolled all of the City of Lakewood, but neighboring cities as well, and that city officials had flown over Petitioner's property at least five hundred times. The trial court also found that all that happened in this case was that Michael White on November 17, or 18, 1969, in making a general routine aerial patrol of the city noticed certain structures on Petitioner's property. He then later ordered another flight over Petitioner's property for the express purpose of photographing the same. The court found that there was no evidence that either of these flights were low flying flights, that the flights endangered anyone, or were illegal.

In this case there is no evidence that the city's helicopter patrol flights are illegal, or that Mr. White in his observations on November 17 or 18, 1969, saw anything other than what was in "plain view" of anyone else routinely flying said helicopter. Evidence so procured in such a case is admissible

(*Harris vs. United States* [1968] 390 U.S. 228, 19 L.Ed.2d 1067, 88 S.Ct. 959). The trial court found in Finding 100 at page 1132 of the Clerk's Transcript that city officials had observed the land, building and structures of Petitioner by visually sighting, and in some cases photographing the same, which consists of walls, a swimming pool, and large structures which were conspicuous and in an urban area where the existence of the same would obviously be observed from the air or adjoining rights of way, including the Edison property, and that the existence of the same could not be within any reasonable expectation of privacy.

In *Dean vs. Superior Court* [1973] 35 Cal.App.3d 112, 110 Cal.Rptr. 585, the California court held that such aerial observances without a search warrant were valid. In that case the court pointed out that helicopter flights, and other flights, were regularly made in the area, and therefore there was no reasonable expectation of privacy as to the growing of a three-quarter acre tract of marijuana on said property. In *People vs. Superior Court* [1974] 37 Cal. App.3d 836, 112 Cal.Rptr. 764, police found a stolen vehicle that had been stripped on the streets of Los Angeles. They thereafter called on a helicopter to search the area for the missing parts, and using binoculars parts of the vehicle were observed in the back yard of a residence. The court pointed out that the area was regularly patrolled by police helicopters, and that an article as conspicuous and readily identifiable as an automobile hood placed in the back yard

can hardly be expected to be protected by a reasonable expectation of privacy.

5. Respondent's Inspection of Petitioner's Real Property was not an Unreasonable Search within the Meaning of the Fourth Amendment.

As stated, the only time Respondents were on Petitioner's property was the occasion where the City Attorney and the Planning and Building Director of Respondent went onto Petitioner's property at the request of Petitioner and his attorney, and in their presence. Inasmuch as Petitioner was the owner of the property Respondents were reasonable in assuming they had his consent, and there was not established at the trial any evidence to the contrary. Although Petitioner seeks to imply in his statement of the case that properties were entered without the permission of tenants, there was in fact no such evidence of any such entry, and that portion of Petitioner's statement of the case is incorrect. The trial court found that the the view of said premises by said City officials, while in and on the buildings and land of Petitioner on that occasion, was in the presence of and with the permission of Petitioner and his attorney (Finding of Fact 101, Clerk's Transcript p. 1132).

Petitioner continues to ignore the facts. The facts, as established by the trial court, and not refuted by Petitioner, were that in many instances the buildings or structures were built pursuant to the Petitioner procuring a permit application to do so, and before the same could be occupied it was necessary that the

City inspect the same and give final approval. Certainly Petitioner cannot contend that such structures are protected under a reasonable expectation of privacy. As stated by this court in *See vs. Seattle*, *supra*, 387 U.S. at page 545, and 87 S.Ct. at page 1741:

> "We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes, nor do we question such accepted regulatory techniques as licensing programs which require inspection prior to operating a business or marketing a product."

6. Respondent has not Deprived Petitioner of Property Without Due Process of Law, or Denied Petitioner the Equal Protection of the Laws.

The Appellate Court in its Opinion at pages 13-14, Appendix A, pointed out that even assuming that Petitioner's offered evidence would have shown that Respondent City never had brought a civil action to require a person to get a final permit without first notifying these persons by mail, the same would make no difference in this case. In the first place it was the Petitioner who brought this action — not the City. Therefore Petitioner's accusation that the City has discriminated against Petitioner by bringing the action is totally without foundation. Certainly Petitioner cannot contend that he may bring innumerable suits against the City, as the record so shows, and yet bar the City from seeking any affirmative relief as to Petitioner on the basis that the City has not

taken similar action as to other people. Furthermore, as pointed out by the Appellate Court, all that the City was seeking by its cross-complaint was compliance, including the requirement that Petitioner now obtain the final inspection and the final permits, the same that would be applicable to anyone else in the City. If Petitioner was correct in his position, it would be Petitioner that would be receiving an advantage no one else in the City is afforded — use and occupancy of buildings without final inspection and permit. Petitioner has not alleged or shown that anyone else is given such a discriminatory privilege.

Petitioner seems to imply that the City is prosecuting him for improper motives. As a matter of fact the record is just the opposite, the court having found that it was the Petitioner who came into court with unclean hands and did all sorts of things to prevent the City from observing his violations, and had shown an arrogant defiance of all lawfully constituted authority insofar as his property was concerned (Clerk's Transcript, p. 964). The court also found in Findings 69 through 74 that the City had not wrongfully or unlawfully entered upon a course of conduct threatening to do anything constituting the invasion or infringement or interference with Petitioner's property right, or his lawful use of his property (Clerk's Transcript, pp. 1035-1037).

Furthermore, the testimony was that the notification procedures, of which Petitioner now complains, actually were commenced a year and a half before

the trial of this case (1975), and the procedure was not in existence when this suit was filed, or prior thereto (Reporter's Transcript, pp. 1502-1503).

7. Petitioner was not Deprived of Due Process of Law, or Denied the Equal Protection of the Laws by Exclusion of Evidence Under California Evidence Code §352.

Commencing at page 18, Petitioner alleges the trial court improperly excluded evidence "relevant to the assertion that the totality of the City's official actions against Petitioner was discriminatory enforcement". He does not state, however, his reference.

This issue is set forth at page 13 of the Court of Appeal Decision, Appendix A. After Chivetta had testified that within the last year and a half prior to trial, where practical the Clerk sent out notices o property owners where their permits were "not finaled", Petitioner's attorney attempted to ask whether any suits had been brought to force persons to get these permits. The trial court on an objection being made excluded the evidence under *§352 of the Evidence Code*, on the basis that its relevancy is very tenuous. *California Evidence Code §352* specifies that the court in its discretion may exclude evidence if its probitive value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. As pointed out by the Court

of Appeal, the relevance of this evidence was very tenuous inasmuch as the notification procedure had been commenced after this suit was filed. Furthermore, the City's type of relief had the same effect.

Petitioner's citation of cases, commencing at page 19 through page 20, are totally misplaced. At page 21 Petitioner cites *Snowden vs. Hughes* (1944) 321 U.S. 1, which states the general rule that the unequal or discriminatory enforcement of a law may, where shown to be intentional, be a violation of the equal protection of the laws clause. Here there has been no such showing by Petitioner or anyone. Neither this case nor the *Wick Wo case*, cited by Petitioner, hold that the equal protection clause is violated because one person is prosecuted and not another. There is no evidence here that the City purposely and intentionally singled out Petitioner Plunkett for disparate treatment on an invidiously discriminatory basis. Rather the exact opposite exists here in that it was Petitioner Plunkett who filed this action, claiming his structures complied with the zoning ordinances. Certainly he could not have proven that cause of action by establishing discriminatory enforcement since the result would in effect grant him a special privilege not afforded other properties in the vicinity and zone. The California courts have held that no vested right to violate a city zoning ordinance may be acquired by continual violation, even though the city has for many years failed to enforce the ordinance *(Donovan vs. City of Santa Monica* [1948] 88 Cal.App.2d 386, 199 P.2d 51).

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

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Attorney for Respondent